

**SUMMARY MINUTES
CITY OF SEDONA LOCAL RETIREMENT BOARD FOR THE
PUBLIC SAFETY PERSONNEL RETIRMENT SYSTEM
Vultee Conference Room, Sedona City Hall, Sedona, AZ
November 8, 2010 - 12:30 p.m.**

1. Call to Order

Chairman Mark DiNunzio called the meeting to order at 12:31 p.m.

2. Roll Call

Board Members: Chairman Mark DiNunzio and Board Members Dan Hautman, Karl Waak, Lucas Wilcoxson, and Al Witte

Staff: Ray Cota, Victoria Ward, Nancy Wilson

Other Participants: Judith Abramsohn, Jeremy Ebert, Joleen Ebert, David Niederdeppe, Walt Spokes

3. Approval of Minutes of October 7, 2010

MOTION: Board Member Waak moved to approve the minutes of the October 7, 2010 meeting. Board Member Witte seconded the motion. VOTE: Motion carried. Five (5) for and zero (0) opposed.

4. Board Expenses

a. Invoice for David Niederdeppe's legal counsel for September, 2010

The board reviewed the invoice submitted by David Niederdeppe for his service as legal counsel to the board for the month of September, 2010. Mark DiNunzio asked whether the \$400 listed as outstanding had been paid. Nancy Wilson verified that the invoice had been submitted for payment but must have been received after the end of the month.

MOTION: Chairman DiNunzio moved to approve the current charges of \$1,420 on the invoice from David Niederdeppe for legal services for the month of September. Board Member Waak seconded the motion. VOTE: Motion carried. Five (5) for and zero (0) opposed.

5. Call to Public

Chairman DiNunzio opened the call to public, and having no requests to speak, closed the call to public.

6. Rehearing of decision regarding the application for disability retirement of Walter Spokes.

Ms. Abramsohn asked for a recap of the reason Spokes was denied his request for an accidental disability retirement.

Chairman DiNunzio summarized the minutes of June 22, 2010, as they related to Spokes's denial. The board saw its responsibility as examining the reason for the separation of employment and the process that the city went through in determining that reason. The board concluded that Spokes was separated by reason of a reduction in force (RIF). The City went through a process of evaluating employees including police officers and came to conclusions on identifying which particular employees would be a part of the

RIF and separated from employment. He said that Tori Ward, the HR director, is here today and can go over that process. The board concluded at the end of that presentation and review of documentation that Officer Spokes was separated by a reduction in force, that there was no evidence or documentation that a disability on the part of Officer Spokes was a part of the determination of the termination. The board looked at that evidence and said that it was strictly a RIF; there was no disability issue involved and concluded that the test of eligibility retirement benefit in ARS 38-844 was not met. The employee was fully employed, working full time productively, and there is no documentation to indicate there was any issue of a disability in play. The board came to the conclusion that he did not meet that initial threshold that drove everything else and denied the request for disability retirement. Mr. Niederdeppe explained that after that action was taken on a normal retirement without prejudice to his right to ask for the reconsideration. The request for a normal retirement was approved at that same meeting. Victoria Ward affirmed that this was an accurate description of what happened.

Ms. Abramsohn, attorney for Spokes, stated her opinion that the employee is eligible for accidental disability if and when the board grants a disability. The *termination* definition in the statute requirements means termination after member has fulfilled all requirements for a pension. It has nothing to do with what happens on the city side for employment; there are two separate systems. She presented a memorandum of applicants to the board for their consideration. She also presented members of the board with copies of ARS 38-842, Definitions; ARS 38-844, Requirements for retirement benefits and disability pensions, and ARS 38-847, Local boards. Board members reviewed this material.

Chairman DiNunzio asked Abramsohn to summarize her memo. Ms. Abramsohn introduced herself and explained her understanding of the statutes that there is a division between the local board and city government: the local board is part of state government, not part of city of government and is charged with member benefits not employment status. Becoming a member is a matter of employment status; once someone is hired by a public entity into a job that has hazardous duty they are eligible to become a member of the system. Once an employee is a member of the system, the system is concerned with their benefits; they aren't concerned with a member's employment status. Benefit under the system is a constant. Once you are a member there is nothing the city can do to take away your benefits. It is inappropriate for a board to look at why someone is no longer employed to determine whether or not that has an effect on their benefits. Boards take that the member's employment is terminated out of context. What that member's employment is terminated by reason of talks about is specifically the definition of retirement in 38-842.1. Retirement means termination of employment after member has fulfilled all requirements for a pension. What this statute is saying is that a member is eligible for an accidental disability if the member's employment is terminated by reason of fulfilling all the requirements under the statute to get an accidental disability, which means if employment is terminated by reason of having a physical or mental condition that the board finds totally and permanently prevents the employee from performing a reasonable range of duties within the employee's job classification and that was incurred in the performance of the employee's duty.

Chairman DiNunzio asked whether Abramsohn's interpretation means that an employee is eligible for a disability pension if they were at any time hurt on the job at any time. Abramsohn replied that yes, that's what the statute says. Abramsohn discussed a hypothetical situation of two officers hurt on the same accident and one is laid off and the other isn't and asked why they should be treated differently. Abramsohn and Chairman DiNunzio discussed the situation. The statute used to be that a member could only get an

accident disability if the member wasn't at their 20 years. The provision is still there for a regular disability; you can only get a regular disability if you don't have your 20 years in. If someone is injured at work and at some point in time they can no longer do their job it doesn't matter how their employment ends. What matters is that they were injured in the performance of their duty and whether or not injury resulted in a condition that totally and permanently prevents them from doing a reasonable range of duties within their job. No provision in the statute allows an employer's action relative to a member to affect that member's benefits. There were no questions for Abramsohn after her presentation.

Walt Spokes gave a summary of the call that led to his injury in 2002. He returned to work six months after the incident and was assigned as the Partners Against Narcotics Trafficking (PANT) supervisor, which was mostly a supervisory type of position. He did this for approximately two years. He then came back to city patrol. His leg felt better, and he was able to work through some shifts. After back for six months or so he got an acting position of patrol lieutenant/commander for approximately 11 months. He maintained a patrol squad; however, 50-70% of his time was spent in the office managing. He then returned as a patrol sergeant for another year or two and then went to investigative sergeant for year or so. It did not require constant sitting in a car or sitting in one spot, which causes him the most problem. He got out of that and went back as a patrol sergeant. He stated that in the last two years as a patrol sergeant his injuries have started to affect his performance. He can't sit in a car for more than a half hour and is constantly having to move and stretch knee and leg. Last six months prior to leaving employment he revised his plan to continue working another five years due to the deterioration in his knee. Every day was a challenge to come into work. Squad members realized he had some limitations and helped him. Everyone in the department knew he had knee injuries and they worked with him on it. He came to the realization that he wasn't going to be able to continue. He has come to the realization that he is not going to be able to get hired by another law enforcement agency and continue being a member of PSPRS. He was planning on maintaining membership in the system at least another two years before entering DROP. He has realized he is not going to be able to obtain the type of position that will allow him to do this.

Ms. Abramsohn asked that the board to reconsider its decision, process the application, send Spokes for a medical board, and consider the question of whether or not his physical condition totally and permanently prevents him from performing a reasonable range of duty within the job classification, and with that whether or not the condition was incurred in the performance of his duties. The fact that the board denied the application before sending to medical board based on the information that he was terminated by a reduction in force is an inappropriate decision by the board.

Victoria Ward stated that she was aware of Spokes's injuries prior to the time she started with the city, but over the six years that she has been here and Walt was employed, she can't remember him ever reactivating the workers' comp case and asking for any kind of a medical evaluation to see whether he needed treatment because of the workers comp case. Spokes stated there were three to four other incidents where his knee was injured and he went to the emergency room with. Abramsohn asked Walt to elaborate on those instances, and he gave a summary of one of the incidents. Abramsohn stated that workers comp has nothing to do with accidental disability retirement under PSPRS; there is no requirement under the system that requires a person to have any prior medical status of a particular disability or to be on workers comp, medical leave, etc. The decision must be based on a medical board not on his performance record.

Chairman DiNunzio stated that the board needed to talk to their attorney because of this new interpretation of 38-844. Abramsohn indicated her willingness to discuss any matters that might need further discussion after Executive Session.

MOTION: Board Member Waak moved to go into Executive Session for purposes of legal consultation regarding this issue. Board Member Wilcoxson seconded the motion. VOTE: Motion carried. Five (5) for and zero (0) opposed.

Board went into Executive Session at 1:21 p.m. and returned to Open Session at 1:46 p.m.

MOTION: Chairman DiNunzio moved that the board affirm its actions of June 22, to deny disability retirement benefit application by Officer Spokes. Board Member Waak seconded the motion. VOTE: Motion carried. Five (5) for and zero (0) opposed.

7. Rehearing of decision regarding the application for disability retirement of Jeremy Ebert.

Ms. Abramsohn introduced herself again and asked the reasoning for denial. Chairman DiNunzio stated that the reason for termination of employment was not by reason of accidental disability. Abramsohn stated that accidental disability is not a typical discipline under employment law and questioned whether that was what the motion actually said. Mr. Niederdeppe provided Ms. Abramsohn a copy of the June 22 minutes of the open session to clarify the board's action.

Chairman DiNunzio reviewed the wording of the motion from June 22. Ms. Abramsohn asked whether the board addressed whether he was even eligible for a benefit under the system. She asked whether he was fired, and Chairman DiNunzio answered that he was not terminated for reason of accidental disability. Ms. Abramsohn stated her interpretation that it is this board that determines he's eligible for an accidental disability retirement. Mr. Niederdeppe stated they said he was not terminated by reason of accidental disability and didn't pass the threshold. Ms. Abramsohn's issue is that the only entity that would make a determination whether or not he was terminated by reason of accidental disability is this board. That's not something that the City of Sedona does and that the board is misreading the statute. The only way that employment can end by reason of accidental disability is if and when this board says the employee has an accidental disability. For the board to say that the only way for him to get it is if the city terminates him for accidental disability is not a decision the city ever makes. What the city does is irrelevant. The board is the only entity that can decide whether or not his career as a police officer ends by reason of accidental disability.

Chairman DiNunzio said that the city was his employer. Abramsohn stated that the board is the only entity that can determine whether or not he has an accidental disability. It is irrelevant why the city terminates him. Chairman DiNunzio stated he understood what she was saying. Ms. Abramsohn stated that there is nothing in the statute that says an employee has to get terminated for that reason. She asked the board to review the definition of retirement, it has nothing to do with what the city does; it's only what the board does for its members benefits. She explained that Ebert was injured on the job and did not return to work between his injury that he's retiring from and getting terminated. Chairman DiNunzio said that he understood Ebert did return to work for a short period of time. Ms. Abramsohn stated that he wasn't back to work long enough to have a fitness for duty exam to even see if he could do his job. Abramsohn asked to clarify that he was injured once and went back to work and was injured again and he didn't come back to

work before he was terminated. Chairman DiNunzio stated that Ebert was injured on October 18 and returned full duty October 20, was suspended November 2. Abramsohn asked Ebert to clarify his duty status. Abramsohn stated that as soon as Ebert returned to work he was put on administrative leave so he didn't actually return to work. Board Member Waak stated Ebert was still working, and Abramsohn stated that he wasn't engaging in duties as a police officer; he was on administrative leave. Chairman DiNunzio asked Ebert to verify that from administrative leave he was suspended on November 2. Board members discussed the chronology of events. Ebert stated that he originally got injured in July; he was off work for weeks; he came back full duty in October and then got injured in October and never came back to work after that. That's when all the lawsuits to get his job back were going on; he never came back and then he got his certification revoked. Abramsohn clarified that he was on administrative leave so he was technically employed but he wasn't engaging in the typical duties of a police officer.

Abramsohn resubmitted the memo previously submitted for consideration. She stated a hypothetical scenario where two officers are in the same car accident and one gets terminated for an unrelated reason; and asked why the one who gets terminated for an unrelated reason loses his ability to get the benefit under the system that every member is entitled to for an accidental disability. There is nothing in the statute that ties what the city does in employment decisions to what the board does in its evaluations of benefits under the system. Board Member Wilcoxson asked for clarification of the chronology of events: He stated that it was October 15 when Ebert got injured on the traffic stop and he was off for a little bit. He asked whether Ebert was saying that he never came back to work. Abramsohn said he was put on administrative leave. Ebert said he was injured the whole time. He came back and he was still under physical therapy. Ebert said he only came back for a little bit before he got into the altercation with McCall. Board Member Wilcoxson asked about after the McCall incident. He did do three or four shifts but he was still on physical therapy before he was on administrative leave. Ebert said that he was on physical therapy three days a week and worked four days a week. Spokes said that he would leave during his shift to go to physical therapy.

Abramsohn referred to ARS 38-844D that it does not refer to termination employment on the employer's side. It refers to termination of employment as that term is used under the definition of retirement. Chairman DiNunzio asked where Ms. Abramsohn sees that connection. Abramsohn said that it's the definition for the statute. Retirement means termination of employment after member has fulfilled all requirements for a pension. ARS 38-844 ties the pension to the disability. The only reason Ebert can be terminated by reason of accidental disability is if the board grants him an accidental disability retirement. It's not something the city does. Board Member Waak stated that Ebert wasn't terminated for an accidental disability. Abramsohn agreed, but that isn't what the statute is talking about; the statute is talking about what the board does, not what the city does. Chairman DiNunzio said that the statute is telling him what the state law is in regard to eligibility. Abramsohn said that the statute is telling the board that the board has to look at its members and that they're eligible for accidental pension if the board finds that he qualifies for an accidental disability retirement.

Chairman DiNunzio asked whether when the statute says if the member's employment is terminated, that's not talking about why he left the city? Abramsohn replied no it's talking about what the board decides at this hearing. Board Member Waak asked about a hearing to have his employment terminated, and Abramsohn said that's what the board is supposed to do according to do to statute. Board Member Wilcoxson said that the board didn't terminate anybody in this board status. Abramsohn agreed and said that the board

doesn't have anything to do with employment and employment has nothing to do with the board. She then reviewed the definition of when retirement is effective. The board is only concerned about what the statute says the board is concerned about. The issue is whether or not he was injured on the job and can still do his job. It doesn't matter what happens on the employment side; a member may still be employed when they apply for an accidental disability. A member gets terminated because the board says the member has an accidental disability. The statute is not talking about what the city does.

Board Member Witte stated that when the city terminates someone as a police officer that's it. Ms. Abramsohn disagreed. He can apply with another agency, still be a member of the system and apply for an accidental disability with the other agency. Board Member Waak stated that was not what happened in this case. Ms. Abramsohn agreed, but stated that is not how the system works. Board Member Witte said that wasn't how it worked here when he was terminated. Ms. Abramsohn said that's why the rehearing was requested. Just because a member is terminated or quits a job doesn't mean he's not a member of the system, and there's nothing in the PSPRS statutes that says just because a member quits working for an employer that they lose any benefits under the system. They retain their full benefits for their entire membership time. Board Member Hautman asked to confirm that he could get a job as a police officer anywhere else or here; that he had given that up. Ms. Abramsohn agreed that Ebert can't get a job with another agency because of his agreement with AZ POST. Board Member Witte said that he did not understand Ms. Abramsohn's interpretation of the statute. Chairman DiNunzio reviewed the definition of retired in 38-841. Ms. Abramsohn stated that the statute talks about termination of employment relative to his status with the system, not with his employer. Chairman DiNunzio then asked whether you could call someone retired or speak of their retirement after they have terminated employment after a member has fulfilled all requirements for a pension; so what we're arguing here is whether Ebert fulfilled all requirements for 38-844B. Abramsohn agreed and said that he was injured on the job and he can't work as a police officer. That's the requirement and then reviewed the definition of accidental disability. A member has up to a year to file an accidental disability application. Ebert is still a member of the system; he is still entitled to all the benefits. Board Member Witte said that he did not retire; he was terminated. Abramsohn said that it doesn't matter; he's still a member of the system and the board is here to determine what his benefits are under the system; not what rights or duties he has under city employment.

Chairman DiNunzio said that the system is saying to the board that for a member to be eligible for accidental disability pension he must have been terminated from employment by reason of the accidental disability. Ms. Abramsohn asked who it is on the board who determines whether he has an accidental disability. Chairman DiNunzio said that on his last day of work the city terminated him for reasons other than that. Ms. Abramsohn said that the city is not the one who decides whether he has an accidental disability; the board does. Board Member Hautman said that the board did decide that. Ebert stated that he's not getting his 20 years, he's just getting what he's put in, the board doesn't understand that. Ms. Abramsohn said that is not relevant. Nothing in the statute says the city can do anything to take away the full panoply of benefits that members have in the system. She does not feel the board is reading the group of statutes as a whole. If a police officer is laid off tomorrow it doesn't mean they lose their benefits under the system.

Board Member Wilcoxson asked Ebert about when he came back off the three or four days what status did the doctor have you come back to work as? Ebert stated he didn't remember. Ms. Ward stated that it was full status. Chairman DiNunzio stated that the reason the board asked for Ms. Ward to come back was because the discussion evolved

into what happened after the second accident on October 18, 2009 and whether or not the officer returned to work before his suspension. Ms. Ward said that he returned to full duty on October 20, 2009 without restrictions. Chairman DiNunzio asked whether when Ebert returned to full duty whether he was taking full days off for physical therapy or hours off during the day. Ebert said that he was at physical therapy three days a week and he was working four days a week. Physical therapy lasted up to two hours. Chairman DiNunzio asked whether Ebert worked a full shift. Spokes explained that he was Ebert's supervisor and Ebert came in late those days, he wouldn't work a full a shift; he would go to his therapy and then come in late.

Ms. Abramsohn asked Ebert to give a synopsis of events that happened on the job that caused his injuries and whether or not it has stabilized. Ebert explained that the two injuries: July 2009 domestic violence, intoxicated subject call, and October 2009 while making an arrest he was assaulted by a subject. After his summary, Ms. Abramsohn explained that the one limitation on receiving benefits 38-849 which has to do with conviction of crimes relative to lying on issues relative to disability issues. That is the only limitation in the statute. Ebert's condition is stabilized and permanent which it wasn't at the time he was put on administrative leave because he was still doing physical therapy. Ebert didn't know how it was going to be resolved. Now he knows it's going to be resolved; that's the reason for the one year to apply for accidental disability. The board is only concerned with his being injured on the job, it's permanent, and that he can't work as a police officer any more. Board Member Hautman asked how an officer defuses a situation when the subject is laying on the floor, not moving. How you defuse the situation by picking him up. Abramsohn replied that it's irrelevant to the discussion, and Board Member Hautman said that there seems to be continuity between the injury and where he is now and it sounds like there was a medical/therapeutic misadventure by a physician, a surgeon that caused some of the problems. A normal reconstruction of a disc doesn't have the problems that were associated with Ebert. Abramsohn said that's why the board should send him to a medical board and that doctor will look at the medical record and give the board feedback on that and be able to answer any questions. The medical board provides a report to the board that addresses whether the employee is disabled, whether it's permanent, and whether it happened during the job, and whether there were any pre-existing conditions. Ebert wasn't sent to a medical board for what Abramsohn said was an inappropriate reason because he had been terminated from the city before he filed his application. Why would it make a difference if he filed his application before he was fired?

Chairman DiNunzio asked about Ebert's comments today about the altercation on the 18th. Did he hear Ebert say that he was assaulted and hurt? Ebert answered that during the event the subject's dog attacked him twice, the subject assaulted him, that he punched Ebert in his arm and turned around on him, which is when he got re-injured. Chairman DiNunzio asked whether that was before or after Ebert used his Taser on the subject. Ebert answered that it was after he used his Taser that the subject assaulted him. He said that it's on video, and that is why he got terminated.

MOTION: Board Member Waak moved to go into Executive Session for purposes of legal consultation regarding this issue. Chairman DiNunzio seconded the motion. VOTE: Motion carried. Five (5) for and zero (0) opposed.

Board went into Executive Session at 2:27 p.m. and returned to Open Session at 2:44 p.m.

Chairman DiNunzio asked whether there were any questions or comments for counsel or Officer Ebert.

MOTION: Board Member Waak moved that the board upholds its decision from the prior meeting June 22, 2010. Member Witte seconded the motion. VOTE: Motion carried. Five (5) for and zero (0) opposed

Ms. Abramsohn asked how to get a transcript of this hearing and the prior hearing. Chairman DiNunzio asked whether Abramsohn wants a full transcript; the board does action minutes and then we also take summary minutes. Mr. Niederdeppe said that if this matter is headed to the courts, that this will board will likely want to direct its secretary to prepare a verbatim transcript because of how that may assist the board and any court that might want to look at this as analysis of these issues. Mr. Niederdeppe said that he would need to confer with the board secretary about how this is accomplished.

8. Old Business

No old business was discussed.

9. New Business (Future Agenda Items)

Karl Waak asked about Randy Moffitt's request for normal retirement. It was approved in October and sent to PSPRS.

Nancy will notify the board if a regularly scheduled meeting is canceled.

Lucas Wilcoxson will continue to serve on the board.

Board Member Waak asked about the length of board terms. Secretary Wilson said that they are two years with rotating elections. Mr. Niederdeppe clarified that the length of terms as being four-year terms with rotating elections.

10. Adjournment

Chairman DiNunzio called for adjournment at 2:49 p.m., without objection.

I certify that the above is a true and correct summary of the City of Sedona Local Retirement Board for the Public Safety Personnel Retirement System held on November 8, 2010.

Nancy J. Wilson, *Board Secretary*

Date